Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRING VALLEY WATER COMPANY (a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation) and TAX COLLECTOR of said City and County,

Appellees.

BRIEF FOR APPELLANT.

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Of Counsel.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANT.

The appeals herein considered involve the validity of fourteen separate orders of the District Court directing the payment of taxes on moneys impounded in various San Francisco banks to await the determination of certain actions pending in that court. It was ordered by this court that the causes as above entitled should all be submitted on one brief (Tr. pp. 53, 54).

Statement of Facts.

In June, 1908, complainant filed, in what was then the Circuit Court of the United States, its bill in equity,

in action numbered 14735, against the City and County of San Francisco and the Board of Supervisors thereof, in which complainant prayed that the enforcement of rates to be charged during the fiscal year 1908-09 for supplying water to the City and County of San Francisco and its inhabitants, as fixed by defendant, should be enjoined. Similar actions with reference to the rates for subsequent fiscal years were thereafter instituted in 1909, 1910, 1911, 1912 and 1913. These actions are numbered, respectively, 14892, 15131, 15344, 15569 and 26 (Tr. pp. 2-12 incl.).

In action numbered 14735, a preliminary injunction was issued and, as one of the conditions thereof, it was required that complainant should deposit in some bank or banks to be agreed upon by the parties to the action the difference between the rates fixed by the municipal authorities and those actually collected by complainant under the injunction, such excess to continue on deposit until the final outcome of the action. It was further provided that such deposits should be subject to the order of the lower court and should only be paid out on checks drawn by a special master and countersigned by a Federal judge. A special master was appointed and directed to ascertain and report the amounts collected from each individual consumer. Mercantile Trust Company of San Francisco was subsequently designated by order of court as the depositary of the impounded moneys, the order directing that such deposits should be carried under an account entitled "Spring Valley Water Company Special Account", and

that they should be subject to the order of the court as hereinbefore stated (Tr. p. 3).

In actions numbered 15569 and 26, the procedure was the same as that taken in action numbered 14735 (Tr. p. 8).

In actions numbered 14892 and 15131, the procedure was the same, with the exception that complainant proceeded to deposit the moneys collected in excess of the ordinance rates with Mercantile Trust Company of San Francisco without any order of court designating it as the depositary (Tr. p. 8).

In action numbered 15344, the temporary restraining order made no provision for the impounding of the excess moneys, but it was subsequently stipulated by the parties that, so long as the order continued in force, the moneys collected in excess of the ordinance rates should be deposited by complainant with Mercantile Trust Company of San Francisco, and that such moneys should be repaid to complainant or to the rate-payers upon the final determination of the proceeding. The deputy clerk of the District Court was subsequently appointed special master in this action (Tr. p. 9).

In accordance with the orders and stipulations above referred to, complainant from time to time deposited with Mercantile Trust Company of San Francisco the moneys collected by it in excess of the rates complained of in the various actions (Tr. p. 14). Portions of the amounts so deposited in each of the actions were subsequently, from time to time, transferred to certain of the following named institutions:

Wells Fargo Nevada National Bank of San Francisco, Mercantile National Bank of San Francisco, The Crocker National Bank of San Francisco, Bank of California National Association, Union Trust Company of San Francisco, and The Anglo and London Paris National Bank.

The orders authorizing such transfers recited in each case that the amount of money deposited with Mercantile Trust Company of San Francisco was greater, in the opinion of the court, than should be deposited with a single depositary; that the above named institutions had theretofore been designated by the court as depositaries in bankruptcy proceedings, and that all deposits when made should be credited to Spring Valley Water Company but should be held subject to the order of the court, as had been theretofore provided (Tr. p. 13). On the first Monday in March, 1913, and on the first Monday in March, 1914, there was on deposit in the various actions in the banks hereinabove referred to, the amounts shown at pages 15 to 18 of the Transcript. There was assessed to these banks on the assessment roll of the City and County of San Francisco for the fiscal year 1914-15 the sums hereinabove referred to. In each assessment the designated bank was described as "Receiver of Impounded Moneys" and was further described as "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14275, 14735, 14892, 15131, 15569, 15344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and

County of San Francisco et al., defendants." Separate assessments were made against each bank for the amounts of money on deposit on the first Monday in March, 1913, and on the first Monday in March, 1914. The moneys were assessed on the assessment roll on the valuations hereinbefore referred to, and taxes were levied thereon for the fiscal year at the rate of 2.289 on each $100 of said valuation. The first assessment in each case was made on the ground that the moneys had escaped assessment for the year 1913-14 (Tr. p. 25). We call particularly to the court's attention the fact that the assessments were made against the *banks* and that they were made against the banks as receivers.

The two assessments to Mercantile Trust Company of San Francisco were originally assessed to Mercantile National Bank of San Francisco, owing to an erroneous return made by the latter institution. These assessments were corrected by the assessor on the assessment rolls subsequently to November 28, 1914 (Tr. p. 28).

Action numbered 14275, referred to in each of said assessments, is an action similar to those hereinbefore referred to, commenced in June, 1907, but no moneys were ever impounded in said action either by stipulation of the parties, order of court, or otherwise, and no one of the banks to whom such assessment was made has ever had on deposit any moneys in connection with said action (Tr. p. 29).

In no one of the foregoing assessments was any separate assessment made of any money impounded in any specified suit, but the assessment was made of all impounded moneys on deposit with each bank as a whole, such assessments covering any and all moneys on deposit with such banks in all of the actions in which the Spring Valley Water Company was complainant and the City and County of San Francisco was defendant (Tr. p. 29).

In certain other instances no money was on deposit with a designated bank in one or more of the actions mentioned in the assessment. In action numbered 26 no moneys were on deposit with any bank on the first Monday in March, 1913, that action having been commenced in June of that year. As to two of the banks, no money had been deposited in such action up to the first Monday in March, 1914. In action numbered 15569 no money was on deposit in four of the banks on the first Monday in March, 1913 (Tr. p. 29).

Each of the above named banks has paid the one per cent tax assessed against it for the fiscal year 1913-14 and 1914-15, under the provisions of Article XIII, section 14, of the Constitution of the State of California (Tr. p. 30).

On November 30, 1914, application was made to the lower court for orders directing the banks herein named to pay the taxes assessed against them and, at the hearing of said application, the court made its fourteen separate orders directing that sums equivalent to

the taxes assessed be paid out of the various amounts on deposit with the above mentioned banks; and the court further ordered that the special master theretofore appointed should draw his checks upon the banks for the payment of said taxes. It is those orders from which the appeals herein considered have been prosecuted.

Specifications of Error.

Errors have been assigned in the record on appeal from the orders of the District Court. The assignments of error will be discussed, for convenience, under the following specifications:

(1) The taxes were not assessed in accordance with the provisions of section 3647 of the Political Code of California, or any other law of the State of California.

(2) The assessments were void under the provisions of Article XIII, Section 14, of the Constitution of the State of California.

(3) The assessments were void because the moneys were described as having been deposited in one or more actions in which no deposit was ever made, and because no separate assessment was made against the amounts on deposit in each respective action.

(4) The orders directing the payment of taxes directed the payment to the tax collector of an entire amount to cover the taxes assessed against each bank and did not specify what amount should be paid out of the moneys impounded in each respective action.

(5) The assessment to Mercantile Trust Company of San Francisco was void because it was originally made to Mercantile Trust Company of San Francisco and changed subsequently to November 28, 1914, without authority of law.

Although not identical, the cases may fairly be said to involve the same problems, except that in the case of Mercantile Trust Company of San Francisco features are presented which are not found in the other appeals. For the convenience of the court we shall make no specific reference in this discussion to the particular facts of the various cases.

I.

THERE WAS NO LEGAL AUTHORITY FOR THE ASSESSMENT.

In attempting to uphold the validity of the assessment and the propriety of the orders made by the District Court, the tax collector is forced to, and does, rely upon the provisions of section 3647 of the Political Code of California, and it is contended that the assessment to each of the banks as "receiver or depository under order of court of the impounded moneys" in the designated action is in compliance with those provisions. The section provides as follows:

> "Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

There is no authority in the section above quoted for an assessment against a "depository" and it is apparent that banks are neither county treasurers, nor county clerks. The assessment must, therefore, be justified, if at all, upon the theory that the banks are receivers in the various actions. That the banks are not receivers is, we submit, too apparent to require an extended argument. That they are ministerial officers of a court of chancery can hardly be seriously contended. Their only relation to the pending proceedings is that they are the custodians of funds collected under orders of court made in those proceedings. The relation established is that purely of depositary and depositor and the court has no jurisdiction over the banks or their officers, or any one connected with them, excepting that it may require the banks to honor checks drawn by the special master and countersigned by a district judge. The direction of the court for the deposit of moneys no more constitutes the banks receivers than would a similar direction from the court for the deposit in the United States Mint constitute that institution a receiver. Each of the actions herein considered was a suit for injunctive relief against the action of a legislative body, and was not of such a nature that the appointment of a receiver could have been, on any theory, upheld. The action of the court in requiring the impounding of the income collected in excess of the ordinance rates was obviously for the protection of the rate-payers, and was adopted instead of the usual method of requiring a bond. At the risk of repetition, we shall briefly restate the procedure taken.

As a condition of granting the injunction or restraining order, as the case may be, the court directed that the excess moneys be deposited in some bank, to be agreed upon by the parties, to await the outcome of the suit. A deputy clerk of the court was appointed special master to account for the amounts collected from the various consumers. Mercantile Trust Company of San Francisco was subsequently designated as the depository for such moneys and the deposit was directed to be credited to Spring Valley Water Company Special Account, subject to the order of the court, and to be paid out only on checks drawn by the special master and countersigned by a Federal judge. The moneys were, in fact, so deposited, and eventually redistributed to other banks. Is it conceivable that, by this procedure, the banks became receivers? That they are not receivers in any sense is tacitly conceded by the wording of the lower court's orders. It will be recalled that, at the hearing, when application was made that the court make its order directing the banks to pay the taxes, the court's attention was called to the fact that it had no jurisdiction over the banks and no power to order them to pay taxes. It thereupon proceeded to cause the special master to voluntarily come forward and use the funds belonging to the parties to the litigation to pay a tax not assessed against him or any person who was actually entitled or authorized to distribute the funds.

In action numbered 15344 the deposits were not even in the possession of the court, but were the private deposits of the complainant made pursuant to a stipu-

lation, entered into between defendants and complainant, that the latter would make such deposits while the restraining order continued in force.

If the theory upon which the lower court must have proceeded is the correct one, no tax can properly be assessed against a receiver who deposits funds in bank, but they must be assessed against the depositary itself. This is, of course, directly opposed to every decision rendered by the state courts on this subject. A receiver is not only authorized, but required, to pay any tax properly assessed, and to set off any debts for which the fund is liable.

Los Angeles v. Los Angeles Water Co., 137 Cal. 699.

Our contention is that where the word "receiver" is used in section 3647 it means exactly what it says. If this contention is sound it is entirely clear that the depositaries herein referred to are not in any sense, and never have been, receivers of moneys collected in the pending rate cases. The funds were in the custody and under the control of the lower court.

It is hardly necessary for us to call to the court's attention the fact that if the banks were not receivers the assessment against them in each instance was not made to the proper party and was, therefore, void.

In

City of San Luis Obispo v. Pettit, 87 Cal. 499,

the Supreme Court of California determined that where

a sum of money had been deposited with the county treasurer in his official capacity under the order of a superior court in a pending suit, the assessment of that fund to the plaintiff in the case, instead of to the county treasurer, rendered the assessment invalid. The court, in considering section 3628 of the Political Code, which provides that "no mistake in the name of the owner, or supposed owner, of real property, shall render the assessment thereof invalid", conceded the application of the section to real property, but held that it had no application to personal property. The same result has, of course, been reached in other instances. It was, for instance, said in

Lake County v. S. B. Q. M. Co., 66 Cal. 17:

> "Unless we can take judicial notice that 'Sulphur Banks Q. S. M. Co.' is the equivalent or an abbreviation of 'Sulphur Bank Quicksilver Mining Company', or unless there was evidence tending to prove that the corporation defendant was known by the name 'Sulphur Banks Q. S. M. Co.' the assessment of the personal property cannot be upheld. Tax proceedings are *in invitum,* and to be valid, must be in strict accordance with the statute. Without an assessment, all subsequent proceedings are nullities; and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. * * *
>
> " 'Sulphur Banks Q. S. M. Co., F. Fiedler, Agt.,' is not the same thing as 'Sulphur Bank Quicksilver Mining Company.' We may conjecture, or very strongly suspect, that the assessor *meant* to assess the defendant as the owner of the personal property, but he did not assess the defendant. * * * It is plain that we cannot identify the name to

which the personal property was assessed as an abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid."

We quote further from

Houser & Haines Mfg. Co. v. Hargrove, 59 Pac. 947, 949:

"Personal property must be assessed to the owner or the person claiming it, or in whose possession or control it was, at 12 o'clock m. on the first Monday of March next preceding the assessment. Pol. Code, sec. 3628. Without a valid assessment, all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it to be made must be observed with particularity. An assessment of personal property to a named person other than the owner is absolutely void."

It is, of course, well settled that statutes imposing liability for taxation are to be strictly construed as against the taxing authority and in favor of the tax payer.

Eidman v. Martinez, 184 U. S. 578;
U. S. v. Wigglesworth, 2 Story 367;
San Francisco v. Banbury, 106 Cal. 129.

It will be conceded that the District Court was without authority to direct the payment of taxes out of the impounded moneys unless there was a valid assessment against such moneys. It was not the province of the court to order that the taxes be paid for any other reason, and there was no valid assessment.

II.

THE ASSESSMENT IS VOID UNDER THE PROVISIONS OF ARTICLE XIII, SECTION 14, OF THE CALIFORNIA CONSTITUTION.

The assessments herein considered were made against the banks and they must stand or fall as such. It has already been shown that they were not made, and could not properly be made, against the banks as receivers. Were they valid against the banks individually? It is submitted that they were not. The assessments cannot be upheld as a tax on account of the funds on deposit because of the provisions of Article XIII, section 14 of the Constitution of California. By amendment enacted in 1910 for the purpose of separating the local and state taxation, there is imposed upon corporations engaged in certain callings—those of public service corporations, insurance companies, banks and trust companies—the obligation to pay certain taxes which are to be applied exclusively to state purposes. It is further provided that those taxes shall be "in lieu of all other taxes and licenses, state, county and municipal" upon all property used in the conduct of business within the state. The legislature in 1911 passed an act to carry into effect the constitutional amendment (Stats. 1911, p. 530). This act was amended in 1913 (Stats. 1913, p. 3615). The Supreme Court of California has given full effect to the provision in the amendment respecting the exemption from local taxa-

tion of the operative property of corporations which come within the designated classes.

San Francisco v. Pac. T. & T. Co., 166 Cal. 244;
Hartford Ins. Co. v. Jordan, 47 Cal. Dec. 175;
Pac. G. & E. Co. v. Roberts, 48 Cal. Dec. 272;
Southern Trust Co. v. Los Angeles, 48 Cal. Dec. 530;
Hughes v. Los Angeles, 48 Cal. Dec. 537.

It appears in the record that the taxes assessed under the provisions hereinabove referred to have been paid by the various banks with whom money was impounded in the actions herein considered, and there is, of course, no room for doubt that funds on deposit with a bank constitute a portion of its operative property. If the taxes were, in all other respects, properly assessed, they were plainly invalid, under this constitutional provision, and the orders of the District Court were for that reason improvidently made. It is, of course, further true that if the assessment was valid against the banks, its payment out of funds in the possession of the court was unauthorized.

III.

THE ASSESSMENTS WERE ERRONEOUS IN THAT MONEYS WERE DESCRIBED AS HAVING BEEN DEPOSITED IN ACTIONS IN WHICH NO DEPOSIT WAS EVER MADE, AND IN NOT SEPARATELY ASSESSING THE AMOUNTS ON DEPOSIT IN EACH SUIT.

As we have already shown in the Statement of Facts, all the assessments refer to the moneys as having been

deposited in certain actions in which, in fact, no deposit had been made. For example, it appears in the record that no deposit was ever made in action numbered 14275. In no one of the seven different funds assessed as having escaped assessment for the year 1913-14 had there been any deposit on account of moneys collected in action numbered 26. Furthermore, and much more important from the viewpoint of complainant, the assessments did not pretend to separately assess the amount on deposit in each action, but assessed all the funds held by any one bank as a unit. It is submitted that this failure to make separate assessments was not only erroneous, but very plainly so. Although it so happens that the same corporation is complainant in each of the actions, the defendants are not identical, different issues are involved in the various actions, and different judgments may ultimately be rendered. Complainant may be successful in some cases and unsuccessful in others. Furthermore, the rate-payers interested in the outcome of the various actions are by no means the same. The total of funds on deposit with any one bank is in no way a unit. It is composed of different amounts, subject to different claims, and deposited under varying circumstances. That this contention is sound is substantiated by the action of the court in distributing the funds originally deposited with Mercantile Trust Company of San Francisco. In effecting such transfer to the other banks herein referred to, a separate order with reference to the funds on deposit

in each respective action has always been made by the court, and the amount credited to each action is as separate and distinct a fund as if the parties to the action were different, and as if the actions were pending in different courts. The only possible justification for the procedure followed is that the assessment was one against the banks, and not against the funds impounded. If that were so, it would, of course, plainly be of no consequence to complainant or to the ratepayers what the amount of the tax was, or what the method of enforcing its payment might be. The theory that the banks are liable for the tax is, however, not the one on which the tax collector has proceeded, and is one which, as we have already shown, cannot be supported by any authority.

The invalidity of an assessment on all the funds held by one bank as a unit may perhaps be most clearly shown by assuming that a water company had instituted an action in the lower court to enjoin the enforcement of water rates, and that a telephone company had instituted another action in the Superior Court of this state to enjoin the enforcement of telephone rates, moneys being deposied in both of these actions with the same bank, pursuant to orders made by the respective courts in which the actions were pending. Can it be for a moment fairly contended that a single assessment against the total fund deposited with the bank in both of the actions, without designating the respective burden which each fund must bear, would be valid?

IV.

THE ORDERS THEMSELVES WERE ERRONEOUS IN THAT THEY FAILED TO SPECIFY WHAT AMOUNT SHOULD BE PAID OUT OF THE MONEYS ON DEPOSIT IN EACH RESPECTIVE SUIT.

For similar reasons the orders of the court directing the payment of the taxes assessed were erroneous in that they directed that one sum shoudl be paid by each bank on account of the tax assessed for each year, and did not specify or determine what amounts should be paid out of the moneys on deposit in each respective action. The orders should either have specified the amounts to be paid out of the funds impounded in each proceeding, or they should have directed that the total tax be properly apportioned against each fund.

V.

THE ASSESSMENT TO MERCANTILE TRUST COMPANY OF SAN FRANCISCO WAS INVALID SINCE IT WAS ORIGINALLY MADE TO MERCANTILE NATIONAL BANK OF SAN FRANCISCO AND WAS CHANGED WITHOUT AUTHORITY OF LAW.

The assessments to Mercantile Trust Company of San Francisco were invalid because they were originally made to Mercantile National Bank of San Francisco and were changed by the assessor on the assessment roll after November 28, 1914. In the case of

Savings and Loan Society v. San Francisco, 146 Cal. 673,

the Supreme Court of California held that:

> "it must * * * be conceded that the assessor had no power to make any changes in the assess-

> ment after he delivered his roll to the board of equalization, unless such changes were authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, or with the written consent of the city and county attorney under section 3881 of the same code."

In the case of

> *S. D. & A. Ry. Co. v. Board of Equalization,* 164 Cal. 44,

the same court, following the rule of the previous case, decided that the power of the State Board of Equalization, in the matter of the making of assessments for state purposes and the equalization thereof, was at an end upon the final delivery of the record of assessments by that board to the state comptroller. It was also determined that

> "it must be presumed that official duty has been regularly performed and, consequently that the State Board of Equalization finally delivered its record of assessments to the State Comptroller on July 1, 1912."

By section 3652 of the Political Code the assessor is required to complete his assessment book on or before the first Monday in July; and by section 3654, he is required to deliver it, as soon as completed, to the secretary of the Board of Supervisors, sitting as the County Board of Equalization. The corrections in the assessments in question can only be justified if they were made in accordance with the provisions of the Political Code, cited in the cases above referred to. Sections 3679 and 3681, mentioned above, refer to changes authorized by the Board of Supervisors sitting

as a County Board of Equalization, and have no application here. The correction must be justified, if at all, under section 3881. This section provides:

> "Clerical omissions or errors or defects in descriptions or defects in form in any assessment-book, when it can be ascertained from the assessment-book or from the assessor's maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment was made, prior to the sale for delinquent taxes; * * * In the city and county of San Francisco the written consent of the city attorney shall have the same force and effect as the written consent of the district attorney."

The change in the name of the person to whom personal property is assessed is, of course, not one of the "clerical omissions or errors or defects in descriptions or defects in form" to which the statute refers. As we have shown from the cases above discussed under a previous section, an error in the name of the person to whom the tax on personal property is assessed absolutely invalidates the tax. Furthermore, the correction is authorized only "when it can be ascertained from the assessment-book, or from the assessor's maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed". The change made in the case of Mercantile National Bank of San Francisco cannot be on any theory brought within these limits. The section has been construed by the Supreme Court

of this state. We quote as follows from the opinion of that court in

County of San Luis Obispo v. White, 91 Cal. 432:

> "In the original roll the special bridge tax was not carried to nor entered in the column headed 'Total tax'; but after the roll was made up and placed in the hands of the tax collector, no sale for delinquent taxes having been made, the district attorney gave his consent, in writing, to the assessor to enter the said tax in the column last mentioned, whereupon the assessor made the proper entries in that column. This is now urged as error. The total tax appeared in the column headed 'Road Tax', and consequently it was clear what the omitted total tax was. It was therefore competent for the district attorney to authorize the assessor to supply the omission, under section 3881 of the Political Code."

From

Los Angeles v. Los Angeles City Water Co., 137 Cal. 699,

we quote as follows:

> "It is contended that this assessment consisted only of the name of the receiver and a copy of his letter. That it was defective in form may be conceded, but the correctness of the figures is not questioned. The assessor, however, with the written consent of the district attorney, corrected the errors and defects in form under the provision of section 3881 of the Political Code, but no change was made in the facts and figures stated in the receiver's letter."

It is therefore apparent that the assessment against Mercantile Trust Company of San Francisco was invalid for the reasons herein considered, as well as for the other reasons previously assigned.

Conclusion.

The funds on deposit are the property either of appellant or of the rate-payers of San Francisco. The fact that their deposit is temporarily under the control of the lower court does not warrant that court in causing their withdrawal unless there is legal authority therefor. The court was under the duty, in so far as any discretion was imposed upon it, of maintaining the integrity of those funds. This was not the course followed. Payments were made therefrom which were not only not required, but for which there was no legal authority.

It is submitted that the orders of the lower court should be reversed, with directions to take such steps as may be necessary to relieve the parties from the effects of the said orders.

Dated, San Francisco,
March 6, 1915.

Respectfully submitted,

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